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IN THE

Supreme Court of the United States

October Term, 1982

CITY OF BURBANK, a municipal corporation and political subdivision of the State of California,
Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, after expressly recognizing its lack of constitutional power directly to require the States to extend unemployment compensation coverage to state and local employees, Congress, in the 1976 Amendments to the Federal Unemployment Tax Act ("FUTA"), indirectly has required this coverage by imposing a penalty for the States' failure to extend this coverage, consisting of the forfeiture by private employers of a federal tax credit, amounting to at least one billion dollars per year in California, and the forfeiture by the States of funds essential to the administration of their unemployment compensation programs, the payment of extended unemployment compensation to former employees of private employers, and the establishment and maintenance of public employment offices.

2. Whether, by requiring the States to extend unemployment compensation coverage to state and local employees, by dictating the terms of this coverage, by requiring state and local governments to pay to the Secretary of the Treasury all amounts raised for coverage of their employees, and by providing that these State and local government moneys may be spent only as prescribed by Congress, those provisions of the FUTA as amended pertaining to the coverage of state and local government employees violate established principles of Federalism in that they: a) deprive the States of the sovereignty reserved to them by the tenth amendment to the Constitution; and b) impose on state and local governments a federal tax, in violation of the doctrine of intergovernmental tax immunity, and thereby deny the States the constitutional guarantee of a republican form of government.

3. Whether the doctrines of *res judicata* and collateral estoppel are applicable where no court has addressed the merits of this petitioner's claims and where the issues presented are of "monumental significance" in that they raise the question of

the power of the federal government to impose a federal tax on state and local governments and to force state and local governments to surrender to the federal government control of state and local government funds and traditional governmental functions and decisions.

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No.

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UNITED STATES OF AMERICA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner City of Burbank* respectfully petitions this Court for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit, entered on July 6, 1982, affirming the dismissal of the complaint in this action.

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*In addition to petitioner City of Burbank and respondent United States of America, the remaining parties to this suit are the following respondents: the Honorable Raymond J. Donovan, Secretary of Labor; the Honorable Donald R. Regan, Secretary of the Treasury; and the Honorable Roscoe L. Egger, Commissioner of the Internal Revenue Service. Pursuant to Fed.R.App. P. 43(c), the Ninth Circuit substituted the last three parties for their respective predecessors: the Honorable F. Raymond Marshall; the Honorable G. William Miller; and the Honorable Jerome Kurtz.

OPINIONS BELOW

The Memorandum opinion of the Ninth Circuit affirming the district court's dismissal of petitioner's complaint is unreported at present, and is reprinted in Appendix A at 1a. The district court's Order of Dismissal is reprinted in Appendix B at 6a.

JURISDICTION

The judgment of the Ninth Circuit was entered on July 6, 1982, and is reprinted in Appendix D at 53a. This petition is filed within ninety (90) days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL AND STATURORY PROVISIONS INVOLVED

The relevant provisions of the Constitution of the United States, the Federal Unemployment Tax Act, related federal statutes, and the 1978 law amending California's unemployment compensation law are reprinted in Appendix E at 54a.

STATEMENT OF THE CASE

A. Introduction.

The Unemployment Compensation Amendments of 1976 ("1976 Amendments" or "Amendments")[1] amended the Federal Unemployment Tax Act ("FUTA"),[2] and, for the first time, Congress "require[d] the States to provide unemployment compensation coverage to all employees of State and local govern-

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[1]Pub. L. No. 94-566, 90 Stat. 2667.

[2]26 U.S.C. §§ 3301-3311 (1976 & Supp. IV 1980), 26 U.S.C.A. §§ 3301-3311 (West. Supp. 1982), *as amended by* Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, §§ 193, 271-273, 276-277, 96 Stat. 324, 408-09, 554-57, 558-59. For ease of reference, further citations to the FUTA will be to the U.S.C.

ments"[3]. Congress has imposed this requirement on the States by denying private employers a credit, in excess of one billion dollars per year in California, against their federal unemployment tax unless their State's unemployment compensation law extends unemployment compensation coverage to state and local employees. In addition, Congress made the expenditure of certain federal funds within the States dependent upon coverage of state and local employees.

California amended its unemployment compensation law to extend unemployment compensation coverage to state and local employees. Petitioner has made the payments necessitated by the 1976 Amendments, and has brought this action to recover the amounts paid, and to have declared unconstitutional those portions of the 1976 Amendments requiring coverage of state and local government employees.

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[3]S. Rep. No. 1265, 95th Cong., 2d Sess. 1, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5997, 5997 [hereinafter cited as Senate Report]. Under section 3309 (b)(3) of the FUTA, a very limited number of state and local employees is excepted from coverage.

Title I of the Employment Security Amendments of 1970, Pub. L. No. 91-373, 84 Stat. 695, amended the FUTA to require States to provide unemployment compensation coverage to certain employees of state and local hospitals and institutions of higher learning. Coverage of these employees was subsumed by the 1976 Amendments. To the extent that the 1976 Amendments are held unconstitutional with respect to their coverage of all state and local employees, the 1970 amendments also should be held unconstitutional with respect to the coverage they provided state and local employees because the 1976 Amendments and the 1970 amendments use the same mechanism to require coverage of the state and local employees specified therein.

II. Application of the Statutory Scheme to Public Sector Employment.

Section 3302(a) of the FUTA allows a private employer[4] to credit against the tax imposed by section 3301[5] amounts that employer pays during the taxable year to a state unemployment compensation fund established pursuant to a state unemployment compensation law which has been certified by the Secretary of Labor. The criteria for certification are set forth in section 3304(a).

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[4]"Employer" is defined in section 3306(a), and, generally, means a person who pays at least $1,500.00 in wages during a quarter of a calendar year or employs at least one person for a minimum of 20 days during the calendar year or the preceding calendar year with each of the days being in a different calendar week.

[5]Under sections 3301(1) and 3306(b) private employers, at present, pay a federal tax equal to 3.4 percent of the first $6,000.00 ($204.00) in wages paid to each employee. The maximum credit allowed each employer is 90 percent of the section 3301 tax, which, for purposes of the credit, is computed at 3 percent instead of 3.4 percent. 26 U.S.C. § 3302(c)(1), (d)(1). This equals $162.00 or 2.7 percent of $6,000.00.

Effective January 1, 1983, private employers will pay a federal tax equal to 3.5 percent of the first $7,000.00 ($245.00) in wages paid to each employee. Tax Equity and Fiscal Responsibility Act of 1982. Pub. L. No. 97-248, § 271(a), (b)(1), (d)(1), 96 Stat. 324, 554-55 (amending sections 3301(1), 3306(b)). The maximum credit allowed each employer will remain at 90 percent of the section 3301 tax, and will continue to be computed in the same manner. Accordingly, private employers will be allowed a maximum credit of $189.00 or 2.7 percent of $7,000.00.

On January 1, 1985, the rate of tax will be increased to 6.2 percent. *Id.* § 271(c)(1)(A), (d)(2), 96 Stat. at 555. The wage base will remain at $7,000.00, and the maximum allowable credit will remain at 90 percent of the section 3301 tax. However, for purposes of computing the credit, the tax will be computed at 6 percent. *Id.* § 271(c)(2)(B), 96 Stat. at 555 (amending section 3302(d)(1). The amount of tax, therefore, will equal $434.00, and the maximum allowable credit will be $378.000 or 5.4 percent of $7,000.00.

Section 3304(a)(6)(A) requires the state law to extend unemployment compensation coverage to service to which section 3309(a)(1) applies, and requires the coverage to be identical to the state law's coverage of other service subject to the FUTA. By virtue of the 1976 Amendments, section 3309(a)(1)(B) applies to service excluded from the definition of "employment" in section 3306(c)(7). Section 3306(c)(7), in turn, excludes:

> service performed in the employ of a State, or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned by one or more States or political subdivisions; and any service performed in the employ of an instrumentality of one or more States or political subdivisions to the extent that the instrumentality is, with respect to such service, immune under the Constitution of the United States from the tax imposed by section 3301.

Accordingly, the Secretary may certify a State's unemployment compensation law only if the law extends unemployment compensation coverage to state and local employees on exactly the same terms it extends to employees of private employers.

Section 3304(a) certification also is dependent upon the state law's requiring immediate payment to the Secretary of the Treasury for credit to the federal Unemployment Trust Fund[6] of all monies received in the State's unemployment fund.[7] Under the 1976 Amendments, this provision is applicable to monies paid by state and local governments for unemployment compensation coverage of their employees. The Amendments,

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[6]The federal Unemployment Trust Fund was established pursuant to 42 U.S.C. § 1104(a)(1976). Section 1104(a) authorizes and directs the Secretary of the Treasury to receive and hold all money deposited in the Unemployment Trust Fund from a state unemployment fund.

[7]26 U.S.C. § 3304(a)(3).

however, do not specify the means by which these entities are to finance the coverage of their employees.[8]

Section 3304(a) certification is essential not only to the allowance of a tax credit to private employers but also to the expenditure of certain federal funds in the State. Pursuant to 42 U.S.C. § 1101(b)(1) (1976), 100 percent of the tax derived from the FUTA is deposited in the federal Unemployment Trust Fund and credited to the employment security administration account established by 42 U.S.C. § 1101(a) (1976). 42 U.S.C. § 1101(c)(1)(A)(i) (1976) makes these funds available for the administration costs of the States' unemployment compensation programs. However, 42 U.S.C. §§ 502(a), 503(a), 1103(b)(1)(B) (1976) prohibit payment to a State for such costs if the State's unemployment compensation law has not been certified under the FUTA.

Pursuant to 42 U.S.C. § 1105(b)(1) (1976), funds in the employment security administration account also are used for the payment of extended unemployment compensation benefits under the Federal-State Extended Unemployment Compensation Act of 1970 ("Extended Compensation Act")[9]. Section

[8]The State's law must allow state and local governments the option of reimbursing the state unemployment fund for amounts actually paid their former employees in lieu of making regular contributions to the fund. 26 U.S.C. §§ 3304(a)(6)(B), 3309(a)(2). Due to budgetary constraints, petitioner chose the regular contribution method rather than the reimbursement method. Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' Notice of Motion and Motion To Dismiss at 3 [hereinafter cited as Plaintiffs' Memo].

[9]Pub. L. No. 91-373, Title II, 84 Stat. 708 (codified as amended at 26 U.S.C. § 3304 note (1976 & Supp. IV 1980), 26 U.S.C.A. § 3304 note (West Supp. 1982)), *as amended by* Tax Equity and Fiscal Responsibility, Act of 1982, Pub. L.No. 97-248, § 191, 96 Stat. 324, 407. Extended unemployment compensation is payable during periods of high unemployment in a State to individuals who have exhausted their rights to regular unemployment compensation. Regular unemployment compensation is compensation payable to an individual pursuant to a State's unemployment compensation law, other than extended and additional compensation. *Id.* § 205.

204(1) of the Extended Compensation Act provides for payment to the States of one-half of the extended unemployment compensation payable to former employees of private employers, but 42 U.S.C. § 1103(b)(1)(B) prohibits these payments to any State whose unemployment compensation law has not been certified under section 3304(a). Similarly, 29 U.S.C.A. § 49d (West Supp. 1982), 42 U.S.C. § 1101(c)(1)(A)(ii) (1976) appropriate from the employment security administration account for payment to the States funds for the establishment and maintenance of public employment offices 29 U.S.C.A. § 49d(b), 42 U.S.C. § 1103(b)(1)(B), however, forbid payment of these costs to a State if its unemployment compensation law is lacking section 3304(a) certification.

Therefore, the failure of a State to extend unemployment compensation coverage to state and local employees results in the denial to that State of federal funds for the administration of its unemployment compensation program, the payment of extended unemployment compensation, and the establishment and maintenance of public employment offices.

III. Actions Taken By the State of California in Consequence of the 1976 Amendments.

In 1978, California amended its unemployment compensation law to extend coverage to state and local employees.[10] The stated purpose for the amendments was "to implement Public Law 94-566 [the 1976 Amendments], which is hereby deemed to be a 'federal mandate' within the meaning of Sections 2206 and 2271 of the Revenue and Taxation Code" because,

> [u]nless California enacts this act to be operative not later than January 1, 1978, California's unemployment insurance program will be out of conformity with the mandates of federal law under Public Law 94-566. This would seriously disrupt California's economy by the imposition of burdensome federal

[10] 1978 Cal. Stat. Ch. 2.

> taxes on California employers and imperil the payment of unemployment benefits by the denial of federal funds to pay for the administration of such benefits to unemployed claimants in California.[11]

The 1978 amendments also provided that, if this Court holds the 1976 Amendments to be unconstitutional, those portions of California's law which extend unemployment compensation coverage to state and local employees, pursuant to the 1976 Amendments, immediately become inoperative.[12] California's unemployment compensation law is in conformity with section 3304 of the FUTA, and has been so certified by the Secretary of Labor.

IV. Proceedings Below.

Petitioner instituted this action on January 17, 1980, to enjoin the enforcement of, and to have declared unconstitutional the 1976 Amendments.[13] In addition, petitioner sought to recover from defendants the amounts which it had paid by virtue of the 1976 Amendments.[14] Jurisdiction was founded on 26 U.S.C. § 7422 (1976), 28 U.S.C. §§ 1346(a)(1), 1331 (1976).[15]

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[11] *Id.* §§ 106,108.

[12] *Id.* § 104.

[13] Compl. ¶ 17. (83a; the complaint is reprinted in Appendix F at 77a.)

[14] *Id.* ¶¶ 12, 13. (81a-82a.) At the time the complaint was filed petitioner had paid in excess of $123,599.84, which amount represented petitioner's payments through March 31, 1979. *Id.* ¶¶ 11-13. At present, petitioner's payments are more than twice this amount.

[15] Compl. ¶ 1. (78a.) By accident, the complaint actually alleged jurisdiction, in part, under "*26* U.S.C. § 1346(a)(1)". (Emphasis added.) Although there was a 26 U.S.C. § 1346, which related to recovery of unconstitutional federal taxes, that section was repealed in 1976. Tax Reform Act of 1976, Pub. L. No. 94-455, § 1901(a)(148), 90 Stat. 1520, 1788. Because 26 U.S.C. § 1346 comprised one section, there was no subsection (a)(1) as there is with 28 U.S.C. § 1346, which relates to civil actions against the United States for the recovery of illegally assessed or collected internal revenue taxes. The intended jurisdictional base, therefore, was 28 U.S.C. § 1346(a)(1) (1976).

The complaint alleged that the 1976 Amendments: 1) imposed a federal tax on the performance of petitioner's vital governmental operations in violation of its constitutional immunity from federal taxation; and 2) impaired petitioner's ability to function effectively in the federal system by displacing its employment policies and impairing its ability to provide traditional governmental services in violation of the tenth amendment and principles of Federalism.[16]

Without addressing the merits of petitioner's claims, the United States District Court for the Central District of California concluded that *New Hampshire Department of Employment Security v. Marshall*[17] and *County of Los Angeles v. Marshall*[18] were *res judicata* as to this action and dismissed the complaint.[19] The United States Court of Appeals for the Ninth Circuit affirmed, holding *County of Los Angeles v. Marshall* to be *res judicata* as to petitioner's claim for declaratory and injunctive relief and collateral estoppel as to its claim for a refund.[20]

REASONS FOR GRANTING THE WRIT

I. Summary.

Through the 1976 Amendments to the FUTA, Congress fundamentally has restructured the relationship between the federal government and state and local governments. The Amendments deprive the States of the sovereignty reserved to them by the tenth amendment to the Constitution, deny them the republican

[16]Compl. ¶10. (80a.)

[17]616 F.2d 240 (1st Cir.), *appeal dismissed* and *cert. denied,* 449 U.S. 806 (1980). (This opinion is reprinted in Appendix C at 31a.)

[18]631 F.2d 767 (D.C. Cir.), *cert. denied,* 449 U.S. 837 (1980). (This opinion is reprinted in Appendix C at 8a.)

[19]City of Burbank v. United States, No. 80-00205 MML(GX) (C.D. Cal. June 20, 1980, *aff'd,* No. 80-5548 (9th Cir. July 6, 1982), *petition for cert. filed,* No. 82-____ (U.S. Oct. 1, 1982)

[20]City of Burbank v. United States, No. 80-5548, (9th Cir. 1982), *petition for cert. filed,* No. 82-____ (U.S. Oct. 1, 1982).

form of government guaranteed by art. IV, § 4 of the Constitution, and violate the doctrine of intergovernmental tax immunity. Congress has achieved this result by requiring state and local governments to provide unemployment compensation coverage to their employees, by dictating the terms of this coverage, and by imposing on state and local governments, for expenditure as directed by Congress, a federal tax.

In *Fairbanks v. United States,*[21] this Court reiterated "the great principle that what cannot be done directly because of constitutional restrictions cannot be accomplished indirectly by legislation which accomplishes the same result."[22] This is precisely what Congress sought to do when it drafted the 1976 Amendments. Congress made compliance appear voluntary, and avoided referring to the amounts state and local governments pay the Secretary of the Treasury as a "tax." However, as even the most cursory examination reveals, the 1976 Amendments suffer from the same flaw as the amendments which this Court held unconstitutional in *National League of Cities v. Usery,*[23] and, largely through the imposition of a federal tax and the subjection of state and local government funds to congressional control, impact state and local governments in such a way as to deprive the States of a republican form of government. If the Amendments are allowed to stand, Congress will have been able to accomplish indirectly exactly that which it concededly was unable to accomplish directly.

The lower courts should not have applied *res judicata* and collateral estoppel to this action. No court has addressed the merits of this petitioner's claims. Further, the importance of the issues raised by this suit, *i.e.*, the constitutional power of Congress to preempt the traditional power of state and local govern-

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[21] 181 U.S. 283 (1901).

[22] *Id.* at 294; *accord* Macallen Co. v. Massachusetts, 279 U.S. 620, 629 (1929); *see* United States v. Constantine, 296 U.S. 287, 294 (1935); United States v. La Franca, 282 U.S. 568, 572 (1931).

[23] 426 U.S. 833 (1976).

ments to structure relations with their employees and to deprive state and local governments of the means by which they provide vital governmental services through imposition of a federal tax, and traditional rules of fairness demand that *res judicata* and collateral estoppel not be employed to avoid resolution on the merits of petitioner's claims.

II. Compliance by the States with the 1976 Amendments Is Mandatory.

In *National League of Cities*, this Court struck down the 1974 amendments[24] to Fair Labor Standards Act ("FLSA"),[25] which required state and local governments to abide by the minimum wage and maximum hour provisions of the FLSA. As shown at 2-3 *supra*, in enacting the 1976 Amendments, Congress declared its intention to require the States to extend unemployment compensation coverage to state and local employees. However, aware of the decision in *National League of Cities*,[26] Congress structured the Amendments to give the impression, superficially at least, that the States have the option of noncompliance. This illusion does not withstand scrutiny.

The consequences of a State's noncompliance fall on state and local governments and private employers within the State, as well as on their former employees and other persons seeking employment within the State. Were a State not to extend unemployment compensation coverage to state and local employees on the terms dictated by the FUTA, the State's unemployment compensation law would lose its certification, and private employers within the State would forfeit their

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[24]Fair Labor Standards Act Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55.

[25]29 U.S.C. §§ 201-219 (1976 & Supp. IV 1980).

[26]"A recent Supreme Court decision (*National League of Cities v. Usery*) invalidated provisions of the 1974 Fair Labor Standards Amendments which had extended minimum wage coverage to State and local employees." Senate Report, *supra* note 3, at 9.

federal tax credit.[27] Rather than paying federal tax at a present net rate of .7 percent, these private employers would be required to pay tax at a rate of 3.4 percent, an almost five-fold increase in their federal tax.[28] In addition, for the reasons set forth at 6 - 7 *supra,* federal law would prohibit the expenditure of funds, including the revenue derived from the 3.4 percent tax, for administration of the State's unemployment compensation program, for extended unemployment compensation payments to former private sector employees within the State, and for the establishment and maintenance of public employment offices within the State.

At the time California was considering conforming its unemployment compensation law to the 1976 Amendments, the cost per year to private employers of California's loss of certification would have been approximately one billion dollars.[29] Further, California would have forfeited more than $80 million in federal funds for the administration of its unemployment compensation program and the establishment and

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[27]26 U.S.C. §§ 3302(a)(1), 3304(a)(6)(A).

[28]Through the 1982 amendments to the FUTA, Congress has made the consequences to private employers of their State's noncompliance even more severe than the present consequences. At present, if a State loses its certification, private employers forfeit a maximum credit of $162.00 per employee, and, therefore, must pay a federal tax of $204.00 per employee rather than $42.00 *See supra* note 5. In 1983 and 1984, these amounts are increased so that, for each employee, private employers would forfeit a maximum credit of $189.00, and would pay a federal tax of $245.00 instead of $56.00. *See Id.* Beginning in 1985, these amounts are increased further so that, for each employee, private employers would forfeit a maximum credit of $378.00 and would pay a federal tax of $434.00 instead of $56.00. *See Id.*

[29]Declaration of William F. Danielson, ¶ 4, Plaintiff's Memo, *supra* note 8, at Exhibit B. (89 a; Exhibit B is reprinted in Appendix F at 88a.) The Declaration of Mr. Danielson was made on November 21, 1977 and the cost to California's private employers may have increased depending upon the current number of private employers and employees in California. Further, for the reasons set forth at n.28 *supra,* this amount will increase dramatically beginning in 1983.

maintenance of public employment offices,[30] and $120 million for extended unemployment compensation payments[31]. Consequently, California had no choice but to comply with the 1976 Amendments. The consequences of decertification by the Secretary of Labor simply were too onerous for California not to extend unemployment compensation coverage to state and local employees on the terms specified by Congress.

Indeed, no State has been able to afford not to conform its unemployment compensation law to the 1976 Amendments. Under these circumstances, compliance by California, and all other states, is as mandatory as was compliance by the states with the 1974 amendments to the FLSA.

III. The 1976 Amendments Violate Established Principles of Federalism.

A. The 1976 Amendments Violate the Tenth Amendment and Represent an Attempt Legislatively To Overrule *National League of Cities*.

Because compliance with the 1976 amendments is required, this Court's decision in *National League of Cities* should be dispositive of the instant suit. In *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*,[32] the Court set forth the three requirements which must be shown to establish a violation of the tenth amendment under the reasoning of *National League of Cities:*

> First, there must be a showing that the challenged statute regulates the 'States as States'. . . . Second, the federal regulation must address matters that are

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[30] *See Id.*

[31] *Id.* This amount may have increased to depending upon the rate of unemployment and the number of unemployed workers who have exhausted their right to regular unemployment compensation. *See* Extended Compensation Act, §§ 202-204.

[32] 452 U.S. 264 (1981).

> indisputably 'attributes of states sovereignty'. . . . And third, it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.[33]

Hodel involved a challenge to the constitutonaly of various provisions of the Surface Mining Control and Reclamation Act of 1977 ("Surface Mining Act"),[34] which was enacted to establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations[35]. The district court held that certain provisions of the Surface Mining Act violated the tenth amendment. This Court reversed the district court's holding based on the distinction between *National League of Cities* and the case before it. The Commerce Clause of the Constitution[36] empowered Congress to pass the statutes involved in both suits.[37] The statute at issue in *National League of Cities,* however, sought to regulate the States as States, whereas, the Surface Mining Act sought to regulate private individuals and businesses[38]. The significance of this distinction is that, while Congress may preempt or displace entirely all State involvement in the regulation of private activity affecting interstate commerce[39], there are limits on the power of Congress to regulate the States as States[40]. In *Hodel,* the Court also noted that, under the Surface Mining Act, "the States are not compelled to enforce the steep-slope standards, to expend

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[33] *Id.* at 287-88 (quoting *National League of Cities,* 426 U.S. at 854, 845, 852).

[34] 30 U.S.C. §§ 1201-1328 (Supp. IV 1980), 30 U.S.C.A §§ 1201-1328 (West Supp. 1982) 18 U.S.C.A. § 1114 (West Supp. 1982).

[35] 30 U.S.C. § 1202(a).

[36] Art. 1, § 8, cl. 3.

[37] *Hodel,* 452 U.S. at 281, 286.

[38] *Id.* at 293.

[39] *Id.* at 290.

[40] *National League of Cities,* 426 U.S. at 845.

any state funds or to participate in the federal regulatory program in any manner whatsoever" because, if they choose not to participate, "the full regulatory burden will be borne by the Federal Government."[41] Accordingly, there could "be no suggestion that the [Surface Mining] Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."[42] For all of these reasons, this Court held the challenged provisions of the Surface Mining Act not to be violative of the tenth amendment.

The *Hodel* decision is particularly instructive because it highlights the reasons why, under *National League of Cities,* the 1976 Amendments to the FUTA are in derogation of the tenth amendment. The three requirements necessary to establish a tenth amendment violation under *National League of Cities,* as set forth in *Hodel,* are found in the 1976 Amendments. Firstly, there can be no doubt that the 1976 Amendments regulate the States as States. This is confirmed by the previously quoted passage from legislative history of the Amendments wherein Congress expressed its intent to *"require the States* to provide unemployment compensation coverage to all employees of State and local governments."[43] Secondly, it is equally certain, particularly in light of *National League of Cities,*[44] that, because they are directed at the manner in which state and local governments structure relationships with their employees, the 1976 Amendments address a matter that indisputably is an attribute of state sovereignty.

Finally, the 1976 Amendments impair the ability of state and local governments to structure integral operations of traditional functions. Unlike the Surface Mining Act, the Amendments require the expenditure of state and local government funds. Even though unemployment among state and local governments was

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[41] *Hodel,* 452 U.S. at 288.

[42] *Id.*

[43] Senate Report, *supra* note 3, at 1. (Emphasis added.)

[44] 426 U.S. at 845-52.

only about one percent[45], in 1978 the Amendments required state and local governments to spend almost two billion dollars ($2,000,000,000.00) for coverage of their more than twelve million (12,000,000) employees[46]; and this yearly expenditure has increased in subsequent years.[47] The impact on petitioner from the cost of providing unemployment compensation coverage to its employees well illustrates the consequences to state and local governments nationwide from extending such coverage to their employees.[48] Due to the cost of providing unemployment compensation coverage to its employees, petitioner may be unable to hire personnel necessary for the provision of services, may be forced to curtail or eliminate existing services, and may be forced to lay off personnel and forego initiating new programs.[49] In *National League of Cities,* the Court concluded that, by attempting to interfere with the employment practices of state and local governments through

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[45]*See* Testimony of Dr. James D. Van Erden, Joint Appendix at 1133-35, *County of Los Angeles.*

[46]*See* Affidavit of H. Jack Lissenden, ¶ 2, Exhibit C, *Id.* at 591, 596; Affidavit of Leonard L. Moak, ¶ 8d, *Id.* at 516.

[47]*See* Affidavit of H. Jack Lissenden, ¶ 2, Joint Appendix at 591, 596, *County of Los Angeles;* Affidavit of Leonard L. Moak, ¶ 8d, *Id.*

[48]The cost to state and local governments of coverage of their employees is particularly burdensome because, pursuant to subsections 3304(a)(6)(A), (11), they must pay their former employees extended unemployment compensation in accordance with the terms of the Extended Compensation Act. As discused at 6 - 7 *supra,* section 204(1) of the Extended Compensation Act provides for payment by the federal government of one-half of the amount of extended unemployment compensation payable to former employees of private employers. The other half is paid by the States. However, pursuant to section 204(3), the federal government pays none of the amounts payable to former employees of state and local governments. State and local governments pay the entire amount, and, by virtue of section 3304(a)(6)(A) of the FUTA, their former employees must receive the same amount of extended unemployment compensation as former employees of private employers.

[49]Plaintiff's Memo, *supra* note 8, at Exhibit A. (Exhibit A is reprinted in Appendix F at 85a.)

the 1974 amendments to the FLSA, "Congress ha[d] sought to wield its power in a fashion that would impair the States' ability to function effectively in a federal system."[50] The same is true of the 1976 Amendments to the FUTA.

For these reasons, the 1976 Amendments contain the three elements which *Hodel* holds must be present to establish a violation of the tenth amendment under *National League of Cities.*[51]

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[50] *National League of Cities,* 426 U.S. at 852 (quoting Fry v. United States, 421 U.S. 542, 547 n. 7 (1975)).

[51] In a footnote to its opinion in *Hodel,* the Court noted that a tenth amendment challenge to an action by Congress might not succeed, even if the three requirements for such a violation were met, if "the nature of federal interest advanced [is]. . . such that it justifies State submission." 452 U.S. at 288 n.29. In support of this proposition, the Court relied on Fry v. United States, 421 U.S. 542 (1975), wherein the Court upheld application of the Economic Stabilization Act of 1970, Pub. L. No. 91-379, Title II 84 Stat. 799 (codified as amended at 12 U.S.C. § 1094 note (1976)), to freeze temporarily the wages of state and local government employees. The Act was passed "as an emergency measure to counter severe inflation that threatened the national economy." *Fry,* 421 U.S. at 548. In addition to being temporary in duration, the Act "displaced no state choices as to how governmental operations should be structured, nor did it force the States to remake such choices themselves," but, instead, "operated to reduce the pressures upon state budgets rather than to increase them." *National League of Cities,* 426 U.S. at 853.

The exact opposite is true of the 1976 Amendments. In enacting the Amendments, Congress made no finding that unemployment among state and local governments was at a level which had an impact on the nation as a whole. In fact, at the time of the passage of the 1976 Amendments unemployment at the state and local government level was only one percent. *See* Testimony of Dr. James D. Van Erden, Joint Appendix at 1133-34, *County of Los Angeles.* Moreover, the 1976 Amendments are not temporary, and, as discussed at 15-16 *supra,* have displaced state and local government choices as to how to structure their operations, have placed a severe burden on state and local treasuries, and have impaired the ability of state and local governments to provide services to their citizens.

Congress also failed to take into account that, by comparison, employees of state and local governments received greater fringe benefits than employees of private employers, and that these benefits

This Court recently reaffirmed the vitality of *National League of Cities,* particularly with regard to the relationship between state and local governments and their employees, in *Federal Energy Regulatory Commission v. Mississippi.*[52] In upholding certain provisions of the Public Utility Regulatory Policies Act of 1978[53] against a challenge based, in part, on the tenth amendment, the Court emphasized:

> We hold only that Congress may impose conditions on the State's regulation of private conduct in a preemptible area. This does not foreclose a tenth amend-

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were figured into the salaries paid state and local employees. *See* Wm. Coleman, Impacts of Unemployment Compensation Amendments of 1976 Upon Personnel Management in State and Local Governments 32-38 (1977), *Id.* at 462-468. Among the benefits state and local governments provided their employees were: pension and social security; paid vacations and sick-leave, including payment of accrued but unused vacations and sick-leave upon termination of employment; health insurance; unemployment compensation; long term disability benefits; death benefits; and educational expenses. *Id.* To impose on the States the additional requirement of providing unemployment compensation coverage on federally prescribed grounds, without consideration of the benefits state and local governments already provided their employees was unfair to state and local governments and upset the balances of equities which they had sought to establish. *Id.* The failure of Congress to account for these benefits further demonstrates that Congress lacked an adequate basis for passage of the 1976 Amendments.

In addition, Congress has indicated the absence of need to treat unemployment compensation uniformly throughout the nation by excluding federal employees from coverage of the FUTA. 26 U.S.C. § 3301, 3306(c)(6). Rather, Congress has provided unemployment compensation coverage to federal employees under a separate statute, 5 U.S.C. §§ 8501-8508, 8521-8525 (1976 & Supp. IV 1980), 5 U.S.C.A. §§ 8501-8508, 8521-8525 (West Supp. 1982). Under these circumstances, no emergency or compelling federal interest was or is advanced by the 1976 Amendments.

[52]456 U.S. ____, 102 S.Ct. 2126 (1982).

[53]Pub. L. No. 95-617, 92 Stat. 3117 (codified in scattered sections of Titles 15, 16, 42, 43).

> ment challenge to federal interference with the State's ability 'to structure employer-employee relationships,' . . . while providing 'those governmental services which [its] citizens require,' . . . as was the case in *National League of Cities.*[54]

Although the 1976 Amendments employ a somewhat different mechanism, they achieve the same result as did the amendments challenged in *National League of Cities,* i.e., direct interference by the federal government with the ability of state and local governments to structure relationships with their employees. In *National League of Cities,* the Court forbade such interference. If the 1976 Amendments are allowed to stand, Congress not only will have denied States the sovereignty reserved them by the tenth amendment, but also effectively will have overruled *National League of Cities.*

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[54]102 S. Ct. at 2142 n. 32 (quoting *National League of Cities,* 426 U.S. at 851, 847). The statutes at issue in *FERC v. Mississippi* as well as in *Hodel, National League of Cities,* and *Fry* were enacted pursuant to the powers granted Congress by the Commerce Clause. The FUTA, however, was an exercise of Congress' taxing power, *see* Charles C. Stewart Mach. Co. v. Davis, 301 U.S. 548, 581-82 (1936) (upholding the validity of title IX of the Social Security Act of 1935, Pub. L. No. 271, 49 Stat. 620, the predecessor of the FUTA), and spending power, N.H. Dept. of Employment Sec. v. Marshall, 616 F.2d at 245, U.S. Const. art. I, § 8, cl. 1.

In *National League of Cities,* the Court reiterated that it "has never doubted that there are limits upon the power of Congress to override state sovereignty even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Art I of the Constitution." 426 U.S. at 842. Later in the opinion, the Court expressly noted that that it was not deciding "whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art I, § 8, cl.1. . ." *Id.* at 852 n.17. The instant suit presents the Court with an ideal opportunity to answer this question, which was left open in *National League of Cities.*

B. The 1976 Amendments Impose on State and Local Governments a Federal Tax, in Violation of the Doctrine of Intergovernmental Tax Immunity, and Subject to a Congressional Control State and Local Government Funds, and Thereby Deny the States a Republican Form of Government.

The immunity of the States from federal taxation was enunciated first in *Collector v. Day,*[55] wherein this Court held that Congress could not tax the salary of a state judicial officer. The Court reasoned that, because the tenth amendment reserves to the States an existence independent of the federal government and art. IV, § 4 guarantees the States a republican form of government,

> the means and instrumentalities employed for carrying on the operations of their governments for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired; should not be liable to be crippled, much less deflated by the taxing power of another government which power acknowledges no limits but the will of the legislative body imposing the tax.[56]

This Court to some extent has narrowed the scope of the immunity of the States from federal taxation.[56] However, the reasoning of *Collector v. Day* remains fully applicable to any federal tax which would impair the ability of the States to perform traditional governmental functions, and the States retain their immunity from such a tax.[58]

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[55]78 U.S. (11 Wall.) 113 (1871).

[56]*Id.* at 125-26.

[57]*E.g.*, Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466 (1939) (overruling *Collector v. Day* as regards the immunity from taxation of the salaries of state and federal officers); Helvering v. Gerhardt, 304 U.S. 405 (1938).

[58]*See, e.g.*, Massachusetts v. United States, 435 U.S. 444, 458-60 (1978); *National League of Cities,* 426 U.S. at 842-43; New York v. United States, 326 U.S. 572, 582 (1945) (plurality opinion).

Congress was aware of the immunity from federal taxation accorded state and local governments when it passed the 1976 Amendments.[59] Just as it sought to circumvent *National League of Cities,* Congress also sought to circumvent the immunity of state and local governments from federal taxation.[60] Accordingly, state and local governments are exempted from the tax imposed on private employers by section 3301 of the FUTA.[61] By virtue of the 1976 Amendments, however, they indirectly are required pay this federal tax.

The FUTA specifies the amount of tax private employers must pay the federal government and the basis for determining this amount[62], but leaves to the States determination of the amount of unemployment compensation to be paid to former employees of private employers together with responsibility for raising the amounts necessary for payments of regular compensation.[63] Section 3302(a), however, provides that private employers only may credit against their federal tax amounts paid to a state unemployment fund. Therefore, by conditioning

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[59] Generally, mandatory Federal coverage under the Federal-State unemployment compensation program exists by virtue of applying the Federal unemployment payroll tax to the employment in question. . . . In the case of State and local government employment, however, such a procedure would raise questions of the power of the Federal Government under the Constitution to lay a tax upon a vital state function. Consequently, the bill would continue to exempt State and local employment from the federal tax but would require coverage for such employment as a condition of approving the State program.

Senate Report, *supra* note 3, at 8.

[60] *Id.*

[61] This was accomplished by excluding from the definition of employment service performed for state and local governments. 26 U.S.C. § 3306(c)(7).

[62] 26 U.S.C. §§ 3301, 3302.

[63] *See* 26 U.S.C. § 3304(a)(3), (4).

the federal tax credit on payments to the state fund, and by placing upon the States the full burden of paying regular unemployment compensation to former employees of private employers, Congress, in effect, has prescribed the minimum amount which States collect from private employers for payments to their former employees.[64] Because section 3304(a)(6)(A) requires former employees of state and local governments to receive the same amount of unemployment compensation as their private sector counterparts, Congress, effectively also has fixed the minimum amount state and local governments must raise for coverage of their employees.

All that Congress has left to state and local governments is their determination of how to finance this federally prescribed amount, which, of course, leaves them nothing. State and local governments must raise taxes and/or reduce services, the consequence of which is to create more unemployment among state and local employees.[65] Further, the amount which state

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[64]It makes little sense for a State to tax private employers at a rate which produces less than the amount of federal tax credit because the difference between any such lesser amount and the amount of the credit would be paid to the federal government rather than to the State, and would not provide a savings to private employers. In this regard, it is noteworthy that many States automatically conform their taxable wage base to the federal taxable wage base, S. Rep. No. 494, 97th Cong., 2d Sess. 377 (1982), and, at present, all States have a minimum taxable wage base of $6,000.00, Conf. Rep. No. 760, 97th Cong., 2d Sess. 653 (1982). Including those states with a taxable wage base in excess of $6,000.00, the average tax rate among the States is 2.4 percent. Conf. Rep. No. 760, 97th Cong., 2d Sess. 653 (1982).

[65]Testifying on the 1976 Amendments before the Senate Finance Committee, then Mayor of New York, Abraham Beame, stated:

> At the state benefit maximum of $95/week, for every one thousand employees laid off, we would incur an unemployment benefit obligation of $3,705,000. At an average salary plus benefits of $15,000, an additional 247 employees would have to be terminated to finance the Unemployment Insurance benefits for the first thousand-and an additional 61 employees to finance the UI benefits

and local governments must raise are subject to the whim of Congress. By amending the FUTA, as Congress has done recently in the Tax Equity and Fiscal Responsibility Act of 1982[66], Congress can increase the amount of revenue state and local governments must devote to coverage of their employees.

This is perhaps most dramatically illustrated by reference to the Extended Compensation Act, which is incorporated into the FUTA as a condition of certification.[67] As discussed at 6 n. 9 and 16 n. 48 *supra*, each State must pay extended unemployment compensation benefits during periods of high unemployment in the State. Section 204 of the Act provides that the federal government will pay one half of the extended benefits payable to former private sector employees but none of the extended benefits payable to former employees of state and local governments. Section 203 sets forth the rates of unemployment which make extended benefits payable,[68] as well as the duration of these payments. By simply changing the level of unemployment which activates the extended benefit period and/or the duration of this period, Congress can increase the

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> of the 247. Thus, one additional worker will face the loss of his or her job for every three laid off to meet budget requirments.
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> The meaning of this cruel arithmetic is that H.R. 10210 [the 1976 Amendments] would add to the unemployment problem in the very areas where joblessness already has become critical. In that regard, the bill undermines the aims of the recently enacted Public Works Employment Act and other programs targeted to assist economically depressed areas.

Unemployment Compensation Amendments of 1976: Hearings on H.R. 10210 Before the Senate Comm. on Finance, 94th Cong., 2d Sess. 142 (1976).

[66]Pub. L. No. 97-248, §§ 193, 271-273, 276-277, 96 stat. 324, 408-09, 554-57, 558-59.

[67]26 U.S.C. § 3304(a)(11).

[68]No distinction is drawn between public and private sector unemployment.

amount states and local governments must raise to finance extended benefit coverage.

The potentially devasting consequences to state and local governments of Congress' control over their funds are readily apparent. State and local governments are rendered incapable of planning their budgets adequately because their budgets are placed at the mercy of Congress' taxing power. Further, state and local governments are likely to find themselves repeatedly in the position of having to choose between foregoing governmental services and programs and further taxing their citizens. These are the type of consequences which led Chief Justice Marshall in *McCullough v. Maryland*[69] to state that "the power to tax involves the power to destroy."[70]

A further indication that the 1976 Amendments constitute a federal tax on state and local governments is seen in the requirement that, once funds are raised for the coverage of state and local employees, they must be paid immediately to the Secretary of the Treasury for credit to the federal Unemployment Trust Fund.[71] Once paid, these funds are comingled with, and subjected to congressional restrictions on their disposition together with, funds derived from federal and state unemployment taxes on private employers.[72]

Under these circumstances there is no question that the 1976 Amendments impose a federal tax on state and local governments, which, in the case of petitioner, has impaired its ability to perform traditional governmental functions. If Congress is able to avoid the immunity of state and local governments from

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[69]17 U.S. (4 Wheat.) 316 (1819).

[70]*Id.* at 431.

[71]26 U.S.C. § 3304(a)(3).

[72]*See, e.g.*, 26 U.S.C. § 3304(a)(3), (4); 42 U.S.C. §§ 502(a), 503(a), 1101(b)(1), 1104(a). Additionally, U.S. Const. art. I., § 9, cl. 7 prohibits money from being withdrawn from the Treasury except "in Consequence of Appropriations made by Law."

federal taxation by the simple expedient of not labeling as a tax moneys which these governments must pay to the federal government, Congress will have eliminated the federal tax immunity of state and local governments. Nothing could more threaten the Constitution's guarantee of a republican form of government than to deny state and local governments their immunity from federal taxation and allow Congress exclusive power to spend state and local government funds.[73] The 1976 Amendments represent such a threat.

IV. Neither *Res Judicata* nor Collateral Estoppel Bars Consideration of the Important Issues Presented By This Suit.

As discussed previously, at 9 *supra*, the district court dismissed petitioner's complaint, and the Ninth Circuit affirmed, holding that the opinion of the District of Columbia Circuit in *County of Los Angeles v. Marshall* provided the basis for ap-

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[73] Just as imposition of the federal tax deprives the States of a republican form of government, so too do federally mandated requirements that state and local governments pay unemployment compensation to their employees and that the funding for this compensation come from state and local governments. This is well illustrated by Brown v. Environmental Protection Agency, 521 F.2d 827 (9th Cir. 1975), *vacated as moot sub nom.* Environmental Protection Agency v. Brown, 431 U.S. 99 (1977), wherein the Ninth Circuit concluded:

> A structure in which all power on the part of the states to spend was vested in Congress while the power and obligation to tax remained with the states would encourage few even casually acquainted with the writings of Montesquieu and the *Federalist* papers to assert that the states enjoyed a Republican Form of Government. Nor could such an assertion be made were all taxation and expenditure responsibility to reside in the Federal government.

521 F.2d at 840. This quotation provides an apt description of the plight in which the States find themselves as a result of 1976 Amendments, and remains fully applicable even if the 1976 Amendments somehow are not considered a federal tax.

plication of *res judicata* to petitioner's claims for declaratory and injunctive relief and collateral estoppel to petitioner's claim for a tax refund.

The doctrines of *res judicata* and collateral estoppel may be applicable where a court of competent jurisdiction has rendered a decision on the merits of a controversey, and the parties to that controversy, or those in privity with them, then seek to relitigate either the same cause of action, in the case of *res judicata,* or a particular issue, in the case of collateral estoppel, in a subsequent action.[74] An additional prerequisite to the applicability of these doctrines is that the party against whom either is to be applied must have "had a full and fair opportunity to litigate" the cause of action or issue.[75] Even under these circumstances, however, neither *res judicata* not collateral estoppel need be applied where an important public policy is in issue or manifest injustice would result.[76] These guidelines counsel strongly against application of *res judicata* and collateral estoppel in the instant suit.

Unlike this case, *County of Los Angeles* was filed prior to the effective date of the 1976 Amendments, and, even though petitioner was a party to that suit, it was one of more than 1750 individual plaintiffs. Further, in its brief *per curiam* opinion, the District of Columbia Circuit declined to address the merits of

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[74]Allen v. McCurry, 449 U.S. 90, 94 (1980); Montana v. United States, 440 U.S. 150, 153 (1979); Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 426 (1955).

[75]Kremer v. Chemical Constr. Corp., 456 U.S. ____, ____ & n. 22, 102 S.Ct. 1883, 1897 & n. 22 (1982); Montana v. United States, 440 U.S. at 153.

[76]Garner v. Giarruso, 571 F.2d 1130, 1336 (5th Cir. 1978); United States v. LaFatch, 565 F.2d 81, 83-84 (6th Cir. 1977), *cert. denied sub nom.* LaFatch v. MM Corp., 435 U.S. 971 (1978); Spilker v. Hankin, 188 F.2d 35, 38-39 (D.C. Cir. 1951) (principle set forth in context of *res judicata*).

plaintiffs' suit.[77] Instead, the court determined that the opinion of the First Circuit in *New Hampshire Department of Employment Security v. Marshall* was applicable to plaintiffs' case and therefore, adopted its reasoning.[78] The court justified this approach by reasoning that the "same challenge had been made by the State of New Hampshire Department of Employment Security" and that such an approach was "in the interest of inter-circuit harmony."[79]

Petitioner was not a party to the *New Hampshire* case. Although petitioner and the other *County of Los Angeles* plaintiffs had sought party status, the First Circuit dismissed them as parties for lack of jurisdiction under section 3310(a) of the FUTA.[80] Further, *New Hampshire* arose from a procedural set-

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[77]The court also did not address either the Memorandum Opinion of the district court denying plaintiffs' motion for a preliminary injunction on the grounds that the Anti-Injunction Act, 26 U.S.C. § 7421(a) (1976), apparently barred the relief plaintiffs sought, County of Los Angeles v. Marshall, 442 F. Supp. 1186, 1188-89 (D.D.C. 1977), *aff'd, 631 F.2d 767 (D.C. Cir.) cert. denied,* 449 U.S. 837 (1980) (21a), or the subsequent Order of the district court dismissing *sua sponte* plaintiffs' complaint for lack of subject matter jurisdiction under the tax exception to the Declaratory Judgment Act, 28 U.S.C. 2201 (1976) and the Anti-Injunction Act, County of Los Angeles v. Marshall, Civ. Act. No. 77-2023, typescript op. at 2-3 (D.D.C. Mar. 7, 1978). *aff'd,* 631 F.2d 767 (D.C. Cir.), *cert. denied,* 449 U.S. 837 (1980) (16a; the Memorandum Opinion and subsequent Order are reprinted in Appendix C at 17a and 14a). The ninth Circuit, similarly, declined to review the applicability of these Acts. *City of Burbank,* no. 80-5548, typescript op at 4. (5a.)

[78]631 F.2d at 769. (12a.)

[79]*Id.* at 768. (11a.)

[80]616 F.2d at 249. (50a.) Petitioner and the other *County of Los Angeles* plaintiffs did file a brief as *amici curiae.* They also participated in the oral argument before the First Circuit, but only were allowed to argue for that part of the 30 minute argument not used by the parties, the State of New Hampshire and the State of New Hampshire Department of Employment Security, both of which argued separately. However, because *amici curiae* are not bound by the judgment of the court, the status as *amici curiae* does not provide a basis for application of *res*

ting entirely different from either the instant suit or *County of Los Angeles. New Hampshire* was an administrative proceeding brought by the Secretary of Labor to determine whether New Hampshire's unemployment compensation law was in conformity with the FUTA as amended.

The Secretary of Labor concluded that New Hampshire's law did not conform with the FUTA in six respects, only two of which implicated the tenth amendment.[81] Even though the State of New Hampshire contended that the case was moot,[82] and the statutory violations alone warranted decertification by the Secretary,[83] the First Circuit addressed the issue of whether the 1976 Amendments violated the tenth amendment, and held that there was no such violation.[84] However, the court did not

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judicata or collateral estoppel. Brown–Crummer Inv. Co. v. Paulter, 70 F.2d 184, 186 (10th Cir. 1934); 1B J. Moore, T. Currier, Moore's Federal Practice ¶.411[6], at 1551-52 (2d ed. 1982); *See* United Parcel Serv., Inc. v. Mitchell, 451 U.S. 56 (1981) (declining to consider arguments raised by *amicus curiae* but not raised by the parties).

[81] 616 F.2d at 245. (41a.)

[82] *Id.* at 243 n. **. (36a.) New Hampshire based this argument on the legislature's enactment of an act designed to bring New Hampshire's unemployment compensation law into conformity with the 1976 Amendments. The court, however, determined that the case was not moot. *Id.*

[83] *Id.* at 249 (Campbell, J. concurring) (dissenting from the majority's consideration of the constitutional issues). (51a.)

[84] *Id.* at 249. In reaching this conclusion, the court discounted the import of *Nation League of Cities*, and, instead, relied upon Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548 (1937), and Carmichael v. S. Coal Co., 301 U.S. 548 (1937). Although in *Steward* and *Carmichael* this Court concluded that Title IX of the Social Security Act of 1935, Pub. L. No. 271, 49 Stat. 620, the predecessor of the FUTA, did not coerce the States in violation of the tenth amendment, that Act did not require the states to extend unemployment compensation coverage to state and local employees. Accordingly, no State or political subdivision thereof was a plaintiff in either *Steward or Carmichael*. It hardly warrants mentioning that private parties do not have the same status, for purposes of standing, as do States and their political subdivisions

address the larger Federalism issue including both the intergovernmental tax immunity and the republican form of government issues. Accordingly, the opinion in *County of Los Angeles* cannot possibly be construed as addressing these issues even though they were raised by petitioner and the remaining plaintiffs.[85]

In view of the above, it is apparent that no court has passed on the merits of this petitioner's challenge to the 1976 Amendments. Application of either *res judicata* or collateral estoppel to the instant suit, therefore, is unwarranted, particularly with respect to petitioner's claims that the 1976 Amendments violate its immunity from federal taxation and denies California a republican form of government. Petitioner raised these issues in this suit[86] but, again, the courts left them unreviewed.

Finally, even to the extent that *res judicata* and/or collateral estoppel may be applicable, there are compelling reasons why they should not be applied in this suit. As discussed at 26 *supra,* courts have refused to apply these doctrines where either important public policies are in issue or manifest injustice would result. In *County of Los Angeles,* the district court characterized the litigation as being of "monumental significance."[87] Indeed, the issues presented by this suit and *County of Los Angeles* go to the heart of this country's form of government. The importance of these issues advises against the slavish application of *res judicata* or collateral estoppel. This is especially true in light of the failure of any court to render a

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for purposes of challenging a statute on tenth amendment or Federalism grounds. Therefore, the First Circuit erred in relying on *Steward* and *Carmichael.* Because the District of Columbia Circuit adopted the First Circuit's opinion, the District of Columbia Circuit's opinion also was based erroneously on *Steward* and *Carmichael.*

[85] *See* Compl. ¶ 17 (Joint Appendix at 21), Joint Brief of Appellants at 61-65, *County of Los Angeles.*

[86] *See* Compl. ¶ 10 (80a), Opening Brief of Appellant at 41-42.

[87] 442 F. Supp. at 1187 (D.D.C. 1977). (18a.)

decision on the merits of this petitioner's claims. For courts to refuse to consider the constitutional issues raised by one of the few laws requiring state and local governments to pay a federal tax and to surrender to the federal government control over their funds and traditional governmental functions and decisions is to decline review of among the most important issues for which courts were created and for which they have earned a unique esteem in this country's system of government. The effect of this refusal has been to deny petitioner its day in court.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully Submitted

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